

Ingles Markets, Inc. and United Food and Commercial Workers Union Local 1995, AFL-CIO.
Case 10-CA-28758

September 5, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX

On June 11, 1996, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ingles Markets, Inc., Morristown, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

John Doyle, Esq. and Mary L. Bulls, Esq., for the General Counsel.

John O. Pollard, Esq., for the Company.

Jeff Francis, Organizing Director for the Union.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. At the close of a 1-day trial in Morristown, Tennessee, on May 22, 1996, I rendered a bench decision, for the greater part, in favor of the General Counsel (Government) thereby finding violations of 29 U.S.C. § 158(a)(1) and (3).¹ This certification of that bench decision, along with the Order which appears below, triggers the time period for filing an appeal ("exceptions") to the National Labor Relations Board. I rendered the bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

For reasons stated by me on the record at the close of the hearing, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by Ingles Markets, Inc. (Company), I found the Company violated Section 8(a)(1) of the Act by Assistant Store Manager Gregg Thompson on or about August 23, 1995, threatening an employee

with closure of the facility if the employees attempted to join a union; and, by interrogating an employee about his and other employees union activities. I also found the Company violated Section 8(a)(3) of the Act when on August 22, 1995, it discharged its employee Geoffrey Hagen (Hagen) because of his union activities rather than for the pretextual reasons seized on by the Company. In doing so I concluded the Company failed to demonstrate by a preponderance of credited evidence that it would have discharged Hagen even in the absence of any protected conduct on his part. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf'd. sub nom. 705 F.2d 799 (6th Cir. 1982). I order that the Company reinstate Hagen, clear his record of the unlawful discharge, and make him whole with interest.

I certify the accuracy of the portion of the trial transcript (pp. 114-128) containing my decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSIONS OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above; and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Company discriminatorially discharged its employee Geoffrey Hagen, I shall recommend he, within 14 days from the date of this Order, be offered full reinstatement to his former job or, if that job no longer exists to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend the Company, within 14 days from the date of this Order, be ordered to remove from its files any reference to Hagen's unlawful discharge and within 3 days thereafter notify Hagen in writing that this has been done and that the discharge will not be used against him in any way. Finally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate notice to employees copies of which are attached hereto as "Appendix B" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

¹ I dismissed a single threat of facility closure alleged against Store Manager Robert Hope for lack of evidence to support the allegation.

On these conclusions of law, and on the entire record, I issue the following recommended²

ORDER

The Company, Ingles Markets, Inc., Morristown, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their membership in or activities on behalf of the Union, or because they engaged in other protected concerted activities.

(b) Threatening its employees with closure of its facility if the employees attempted to join a union.

(c) Interrogating its employees about their union activities, sympathies, and desires.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer Geoffrey Hagen full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Geoffrey Hagen in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director of Region 10 of the National Labor Relations Board, post at its Store Number 313 Morristown, Tennessee, copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the tendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to all current employees and all former employees employed by the Company at any time since September 11, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 10 of the National Labor Relations Board a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and hereby is, dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

[Official transcript pages 114 through 128]

DECISION

JUDGE CATES: On the record. Let me state at this point that it has been a pleasure to hear this case because when you go out and hear a case where the Parties know what it is they want to present, and they do so, and treat each other with the respect in the Court Room that you would treat your best friend, it makes it very easy for me to listen to the trial.

As you may, or may not, have noted, I asked no questions during this—perhaps, I did ask one question if there was a relationship [father-son] between the two gentlemen. That is the only question I asked. Let me state that both Counsel are a credit to the Party they represent, and whoever wins, or whoever loses, you may not lay the blame at the feet of Counsel for either side because both have done an excellent job in presenting their case, and it has been a pleasure to hear.

I make the following findings: That the charge in this case was filed by the Union on September 11th and served on the Company on September 14, 1995. I find that the Company is a North Carolina Corporation with an office and place of business located in Morristown, Tennessee where it is engaged in the retail sale of groceries, and related products. I find that annually they derive gross revenues in excess of \$500,000.00 and that annually the store herein purchases and receives at its Morristown, Tennessee facility products, goods, and materials valued in excess of \$50,000.00.

I find that the Company, at all times material herein, has been an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the allegations of the Complaint and the admission by the Company I find that the United Food & Commercial Workers Union Local 1995, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

Based on the allegations of the Complaint and the admissions thereto and the evidence that's been presented in this case, I find that Mr. Robert Hope, the Store Manager, and Mr. Greg Thompson, the Assistant Store Manager, are supervisors and agents of the Company within the meaning of Section 2(11) and 2(13) of the Act.

Now, we come down to the meat of the case, and whether I get the facts correct, or not, I trust I will. I think that everything I am about to say is substantiated clearly by the record, and from inferences drawn therefrom.

The evidence tends to indicate to me that the Store in question, which is Store No. 313, was perhaps much smaller in its previous location than in its current location, and I base that, among other things, on the fact that I'm told the dairy

case facility perhaps doubled in size from the previous store to the present store, and that the size of the present store is much larger than the size of the previous store.

I'm also persuaded that Mr. Bruce W. Thompson, the gentlemen who is the District Manager and has been since May of 1970, is like some of the rest of us not a young man, and he likes for the job to be done the way he knows it can be done, and that for the lack of a better description, I found him to be a hard nosed District Manager who wants the seventeen stores under his jurisdiction to meet the standards that over the years he has established for himself, or that Company policy has established for him.

He, as he testified, and I credit his testimony in this respect, had problems with Store No. 313. Now, he may have had problems with other stores, or he may not have. The only store with which I am now concerned is Store No. 313. He visited the store on several occasions, and found that the standards he wanted applied to shelving the store, and in essence managing the store, were not being followed.

That is, Mr. Bruce Thompson had a problem with Mr. Robert Hope and with Mr. Greg Thompson, so, what does he do. He sets out to straighten out the problem, and on several occasions he points out to the Store Manager, Mr. Hope, that certain departments are not up to standard. That is, among other problems, he found the Dairy Department not up to standard.

He found the Grocery Department, particularly, I believe he said that went with soaps, and some other items on the regular shelves of the Department were not up to standard. He came back in when they had a sale in the Meat Department, and he found that there was no cube steak, or hamburger patties. I forget what all it was that he found wasn't there.

He goes back, he's going to put it [the meat products] out himself. Finds there's not even any there to put out, and the person [responsible] has left early. I believe the person was a Mr. Moore. Mr. Moore had supposedly come down from the Newport Store.

Mr. Thompson, if I may refer to him as the Senior Mr. Thompson, followed the procedure that he believed the Company wished to have followed. That is, have the Store in proper order, and give discipline in written form, and document it if it wasn't being done.

The reason I'm persuaded that the Company has a disciplinary policy that involves written disciplinary procedures is the Senior Mr. Thompson testified that when he came back in the next day after he discovered the meat was not in the order he wanted it, that he met with Mr. Moore and pointed out to Mr. Moore that he had been warned back at the Newport Store.

The Senior Mr. Thompson also provided the Store Manager at the Store No. 313 a written warning. That they had a policy that they followed, and Mr. Thompson Senior was following that policy it appears from the evidence in this case to the extent that I need to address that.

I only address all of that to say that when it comes down to this particular Store with its multiple problems, and I think the evidence is unrefuted that they have problems in this Store, and that they have problems specifically with the gentleman previously in the Dairy Department. That he pulls matters [products] forward, shapes it up, or whatever you call

it in doing the shelving but may not fill the shelves in as much as they should be filled in.

The Company did not institute any written discipline against Mr. Hagen even though there were almost weekly encounters with the issue of whether the dairy case and the end case which contained dairy products was being properly maintained. When they fire someone without following their normal procedure of providing a written warning before discharging, then, it raises suspension as to why they did discharge the individual.

That brings us to the analytical mode under which these type cases are decided. The analytical mode that the Board follows is set forth in *Wright, W-r-i-g-h-t, Line, L-i-n-e*. The case is entitled *Wright Line*, and reported at 251 NLRB 1083, a 1980 case.

The analytical mode for resolving discrimination cases turning upon Employer's motivation is clearly outlined in that case. The Government, or the General Counsel, must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Employer's decision.

Once accomplished, the burden shifts to the Employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a Respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the Respondent desires to conceal.

The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding might be inferred from the record as a whole. How does the General Counsel make out a prima facie case?

The General Counsel does so in the following manner: The General Counsel must establish (a) Union activity; (b) Employer knowledge; (c) Animus, and adverse action taken against the individual involved, or suspected of involvement, which has the effect of encouraging or discouraging Union activity. Now, inferences of animus and discriminatory motive may be warranted under all the circumstances of the case even without direct evidence.

Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. Now, once the Government establishes a prima facie case, if they do, the burden shifts back to the Respondent to establish its *Wright Line* defense which it must do only by a preponderance of the evidence.

The Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate their defense. Now, that's the analytical frame work in which I will analyze this case.

We start with—was there Union activity? Well, there is no direct evidence presented that the Company knew of that activity prior to the discharge. However, the matter doesn't rest there. We come then to a critical credibility determination that need be made. Did a conversation occur between Mr. Delph and the Assistant Store Manager, Mr. Greg Thompson, and at least a recapitulation based on Delph's testimony, to Mr. Hope.

You try to think. What motive does Mr. Delph have for misspeaking the truth? He's no longer employed by the

Store, so, presumably, they could take no further action against him even if they wished to. Does he bear a grudge against the Store? Does he feel uncomfortable about his relationship with the Store? He testified that he believed he was going to be fired, or at least he had been told that he was going to be fired, so he went ahead and accepted a job with a competitor store.

Some evidence was presented that he tried to get his job back the next day after he resigned. His explanation for that was, he was close to the year end, and he would have gotten a bonus, or whatever it was, if he had worked two more weeks.

Then, you look at the other side of it. What motive does Mr. Thompson, Greg Thompson, have to misspeak the truth, or what motive does Mr. Hope have, if any, to misspeak the truth. In this case, one could reason that if they were, in fact, misspeaking the truth, perhaps, they do so to placate or to come in line with the wishes of the Senior Mr. Thompson.

That is, Mr. Thompson wants the Store run in a very precise manner, and Mr. Thompson Senior perceives that it is not, and, so, would Mr. Greg Thompson and Mr. Hope have a reason to wish to insure that they don't have any more problems than what they perceive they have at the present by having a Union come in.

So, how do you resolve that credibility resolution because it's not one that can be resolved in a manner that one just misunderstood what the other said, or that each gave a varying version of what was said. Mr. Delph testified that the two meetings took place, and Mr. Greg Thompson and Mr. Hope say it never happened.

In addition to demeanor, I am going to conclude and find that Mr. Delph recalled the events truthfully. I do so because in addition to the credibility problems, there were a number of factors that perhaps could have strengthened the case for the other side, and Company Counsel readily recognizes one of them. He has no means of getting the cards here from South Carolina, or North Carolina, wherever the time cards may be.

In addition to that, no one testified—other than Mr. Greg Thompson—that it was his policy to leave the store at 10:00 or 10:05. Is it reasonable to infer that a Store Manager, and I'm assuming when Mr. Hope is not there that the Co-Store Manager, or the Assistant Manager, is the person in charge of the Store. Is that person going to walk out right on time every night, or is that person going to make sure that the Store is in the shape that it should be before he departs the premises.

So, having concluded that I will credit the testimony of Mr. Delph, he testified, he and Thompson spoke on Thursday night in which Thompson asked him if he was involved with the Union. That he had heard that Mr. Hagen was involved with organizing the Union, and he also had heard that Mr. Delph was, and Mr. Delph denied such.

I find the conversation which also included that it was good he was not involved because if he had been, the Company would close the Store. In fact, they might even close the whole Company if they were to go Union. I find as alleged in Paragraph 7 of the Complaint that conversation, as testified to by Mr. Delph, whose testimony I have credited, would support the conclusion, or the allegations, set forth in Paragraph 7 of the Complaint that Mr. Thompson interrogated Mr. Delph about his Union activities, and that Mr.

Thompson threatened Mr. Delph that the Company would close its Store if the employees attempted to join a Union.

Mr. Delph testified he was told that it would be a good idea to tell that to Mr. Hope, Store Manager Hope. I conclude he [Delph] told Store Manager Hope, but I do not conclude as alleged in Paragraph 8 of the Complaint that Mr. Hope threatened employees with the Store closure based on Mr. Delph's telling him what Mr. Thompson had said. I do not draw that conclusion.

I didn't have an opportunity to tab the various witness's testimony, so, I'm having to—Mr. Delph's testimony that Mr. Hope told him that Unions were a thing of the past and no longer needed, I do not conclude a comment of that sort to constitute a violation of the Act.

Then, we come back to whether or not the Government has made out a prima facie case with respect to the discharge of Mr. Geoffrey Hagen, and we look, again, at the elements of what constitutes a prima facie case. The Government has established Union activity through the testimony of Mr. Delph and Mr. Hagen that they had Union activity, and, further, Mr. Greg Thompson's telling Mr. Delph that he had heard from a friend of his at Kroger that Mr. Hagen had been involved in the Union. In the totality of the circumstances of this case such would establish that the Employer knew of the Union activity.

Certainly, to tell an employee that the Store would close if Union activity was involved in by the employees demonstrates the animus, and, then, adverse action was taken against Mr. Hagen without following the Company's policy, its own policy of discipline.

Not only is the timing very suspect in this case, but the fact that the Company didn't follow its own policy of disciplining employees in that they had not given Mr. Hagen verbal warnings, or written warnings, whereas, it is clear that Mr. Bruce Thompson gave Mr. Hope a written warning advising him that if things didn't improve he would be gone.

Also, Mr. Moore was given a written warning at Newport before he was discharged down in Morristown, and Store Manager Hope even gave Mr. Delph a written warning, so, I find that the Company discharged Mr. Hagen for his Union activities. The case simply falls apart on two points, and one is on credibility on whether or not Mr. Delph had a conversation with Mr. Thompson and Mr. Hope, which I find he did.

The second is, that the records—there is no documentation to show that Mr. Hagen was an unacceptable employee. He was continued to be retained. He was warned, or had matters mentioned to him, perhaps, as many as five times in July, and two, or three, times in August, but the Company never utilized its disciplinary form such as reflected in Respondent's 2, or General Counsel's 2 either one I guess. The documentation is missing.

In concluding that the Company discharged Mr. Hagen for his Union and concerted protected activity, let me just state in summary what I am not finding. I'm not concluding that he's an exemplary employee. By his own admission, the shelves, he has not maintained stock in the manner that he has been told to stock. I'm not addressing whether Mr. Greg Thompson and Mr. Robert Hope are excellent managers, or otherwise. I'm not meeting any of those issues.

I'm simply saying that I credit Mr. Delph's testimony that the conversations took place, and I find, with great weight,

there was no documentation of continual corrections of Mr. Hagen as a less than exemplary employee. I shall order that the Company reinstate Mr. Hagen to his former job, or if that job no longer exists, to a substantially equivalent position of employment.

I order that he be made whole, and that the Company post a notice advising its employees of their rights under the Act, and its obligation to abide by the Act. In a most recent Board decision that came out perhaps within the last thirty days, or maybe even less time than that, the Board has changed its remedy procedures considerably. I shall apply in the written certification of this decision, I shall apply those new remedy guidelines.

For example, instead of saying that the employee must be reinstated immediately, it says must be reinstated within fourteen (14) days. In the past when the Company had twenty days to advise the Regional Director what steps it had taken to comply with the order, that now must be in the form of an Affidavit as I understand it.

I order not only that Mr. Hagen be reinstated and made whole, but that his records be expunged of any disciplinary action taken against him as a result of his discharge, and that it not be used against him in the future. You have a set number of days to do that. I think the new decision calls for fourteen (14) days to expunge and three days to thereafter notify Mr. Hagen in writing that this has been done. I will be applying the most recent Board pronouncement on the remedy aspect of the case.

As to taking exception, or further actions with this matter, I will issue upon receipt of the transcript, which the Court Reporter will provide within ten (10) days, I will issue a certification of the decision which will be captioned Bench Decision. I will set forth a statement of the case, and I will attach thereto as an attachment to my Bench Decision the pages of the transcript that constitute my decision.

Then, as I understand it, but please check the Board's Rules and Regulations, your time for seeking a review, or an appeal, of my decision runs from that time. That's my understanding, but if my understanding is incorrect, please follow the Board's Rules and Regulations.

In summary, I find, as I have already indicated, the allegations of Paragraph 7 and 9 of the Complaint, and the corresponding Paragraphs 10, 11, and 12. I did not find a violation with respect to Paragraph 8 of the Complaint, and I shall dismiss Paragraph 8 of the Complaint.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees for engaging in union activities.

WE WILL NOT threaten our employees with closure of our facility if they attempt to join a union.

WE WILL NOT interrogate our employees concerning their union activities sympathies or desires.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order offer Geoffrey Hagen full reinstatement to his former job or, if his former job no longer exist to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed; and, WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this order, remove from our files any reference to the unlawful discharge, and within 3 days thereafter notify Geoffrey Hagen in writing that this has been done and that the discharge will not be used against him in any way.

INGLES MARKETS, INC.